Supreme Court, U. S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-623

ON APPEAL FROM THE SUPREME COURT
OF ILLINOIS

PERCY S. WINFIELD,

Petitioner,

v.

WALGREEN CO., an Illinois Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

THOMAS P. HAUGH,
Attorney for Appellee Walgreen Co.

THOMAS P. HAUGH,
175 W. Jackson Blvd.,
Suite A1045,
Chicago, Illinois 60604,
(312) 663-5385.

Keenan Printing Company 312-648-0050 365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-623

ON APPEAL FROM THE SUPREME COURT
OF ILLINOIS

PERCY S. WINFIELD,

Petitioner,

v.

WALGREEN CO., an Illinois Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, WALGREEN CO., in opposition to the Petition for Writ of Certiorari states that the Petitioner fails to satisfy the requirements of Rule 19 of the Rules of the Supreme Court of the United States governing the considerations of matters on Certiorari. The State Courts of Illinois have not departed from the accepted and usual course of judicial proceedings such that this Honorable Court should exercise its power of supervision. As stated more fully hereafter, the Petitioner has not been deprived of his right to trial, is not without remedy within the trial court, has not exhausted his remedies before the trial court and has not been prejudiced as the Petitioner has not had an order entered against him dismissing his first amended complaint or his cause of action. The Petitioner's first amended complaint was stricken with leave to amend and he may yet proceed to trial if he does file amended pleadings.

The order from which the Petitioner sought an appeal through the Illinois State Courts was entered in the Municipal Department of the Circuit Court of Cook County on November 30, 1979 and denies the motion of the Petitioner to vacate an order of Court dated August 6, 1979. As the Petitioner alleges and as the record reflects, the Respondent served a notice of motion upon the Petitioner bearing an incorrect date for hearing of August 5, 1979, a Sunday. The error was not noticed by either the attorney for the Respondent or the motion judge and on Monday, August 6, 1979, the motion of the Respondent to strike the Petitioner's first amended complaint was granted and a draft order entered on August 6, 1979 ex parte. A copy of that order was directed by letter to the Petitioner on August 6, 1979.

The order of August 6, 1979 struck the Petitioner's first amended complaint and granted the Petitioner leave to file a Second Amended Complaint within 60 days.

On November 30, 1979, the Petitioner moved to vacate the order of August 6, 1979 and in support of that motion filed a supporting affidavit. After a hearing, the Petitioner's motion was denied. The basis of the order is that by custom and practice in the Circuit Court of Cook County, all matters set for Court holidays are heard on the next day that Court is in session.

The effect of that order therefore, is to leave the order of August 6, 1979 standing wherein the Petitioner was granted leave to file a Second Amended Complaint. The Petitioner is not in default as to that order as no subsequent proceedings have been held. The Petitioner has not at any time offered to file such complaint nor has he sought leave to either extend the time in which to amend or to file such complaint.

The inclusion of the wording from Rule 304(a) in the order of November 30, 1979 does not confer jurisdiction on the Appellate Court where the order in fact is not an appealable order. The rule in Illinois is set forth in a line of Illinois Supreme Court cases wherein it has been stated:

> ". . . our review is limited to orders that can be characterized as final . . . An order of court which leaves a cause still pending and undecided is not a final order . . . Before we can call an order final, it must be dispositive of the issues and rights of the litigants . . . An order is final only when it terminates once and for all, the litigation or some definte part thereof." (citations omitted) *LaVida, Inc.* v. *Robbins,* 33 Ill. App. 2d 243, 178 N.E. 2d 412, 413 (2nd Dist. 1961).

". . . the inclusion of the special finding in the trial courts' order cannot confer appellate jurisdiction if the order is in fact not final." *Crane Paper Stock Company* v. *Chicago & Northwestern Railway Company,* 63 Ill. 2d 61, 344 N.E. 2d 461, 464 (1976), *Martino* v. *Barra,* 37 Ill. 2d 588, 229 N.E. 2d 545 (1967), *Davis* v. *Childers,* 33 Ill. 2d 297, 211 N.E. 2d 364 (1965).

By motion of the respondent WALGREEN CO., the Appellate Court of Illinois in appeal #80-007 dismissed the appeal of Petitioner, PERCY WINFIELD, on Februar 1, 1980 and remanded the case to the Municipal Department, (trial court) First District, Circuit Court of Cook County.

The Petitioner sought an appeal in the Supreme Court of Illinois. A response to the petition for leave to appeal was filed by the Respondent and on May 29, 1980 the Supreme Court of Illinois denied the petition for leave to appeal, #53090.

The status of the proceedings in the State Court is then such that the case is remanded to the trial court for further proceedings. In the trial court, no final orders have been entered, no complaint is on file and the parties are not now at issue. The Petitioner may then at this time seek leave to file a second amended complaint in the trial court and proceed to trial. There having been no final determination made, the Petitioner has not been prejudiced nor denied any right to trial or the right to be heard.

Respectfully submitted,

BY: THOMAS P. HAUGH,
175 W. Jackson Blvd.
Suite A1045
Chicago, Illinois 60604